

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DERRICK PARKER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,011,700
<b>INTERNATIONAL HOUSE OF PANCAKES</b>	)	
Respondent	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the August 26, 2003 preliminary hearing Order of Administrative Law Judge Jon L. Frobish. Claimant was denied benefits after the Administrative Law Judge determined that claimant's alcohol consumption prior to the injury contributed to claimant's injury, thereby denying claimant benefits under K.S.A. 44-501(d)(2). Claimant argues the evidence is insufficient to justify a finding that claimant had consumed alcohol or that there was a contribution to the injury from that alcohol consumption.

**ISSUES**

The following issues were appealed by claimant to the Workers Compensation Board (Board) from the August 26, 2003 preliminary hearing Order:

- "(1) Application of K.S.A. 44-501(d)(2) to the facts presented I [sic] this claim;
- "(2) Jurisdiction for this appeal is established under K.S.A. 44-534a(2) as the issue is whether a Defense applies."

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant was a dishwasher for respondent, International House of Pancakes (IHOP), on the alleged date of accident of June 28, 2003. It is acknowledged by respondent that claimant suffered a fall on that date while in respondent's kitchen. Respondent, however, contends that it was claimant's alcohol consumption which

contributed to the injury and, therefore, compensation should be denied under K.S.A. 44-501(d)(2), which states, in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol . . . .

The testimony regarding the incidents leading up to claimant's fall conflict. Respondent presented two witnesses on its behalf who testified before the Administrative Law Judge. The night manager, Mahmoud (Mo) Abdelqader, was claimant's supervisor on the night of the alleged accident. He testified that claimant came to work at 10:00 p.m. and, after clocking in, rather than going to work, was standing and talking to "the girls" and drinking coffee. Claimant was called into the kitchen by Mo in order to discuss claimant's failure to go to work. When claimant came close to Mo, Mo smelled the distinct odor of alcohol on claimant's breath. After questioning claimant in the office, claimant reluctantly admitted that he had been drinking. Claimant told Mo he had had several drinks. Mo described claimant's speech as slurred. Mo told claimant to go home for the remainder of the evening as Mo was unable to use claimant in his condition. They got up to leave the office, with Mo walking ahead of claimant. Mo heard a noise and turned around, and found claimant lying on a rubber mat on the floor. Mo stated that claimant advised him that he fell down because he had been drinking.

Claimant, at the preliminary hearing, denied the incidents discussed by Mo, testifying that he had not had anything to drink that night. Claimant testified that he had not had a conference with Mo in the office that evening but that, instead, he had gone to work and the fall had occurred as he was going about his duties as a dishwasher.

Respondent also presented the testimony of April Randall, a waitress at respondent's facility. Ms. Randall testified that she was leaving IHOP on the night of the alleged accident, as her shift concluded at 10:00 p.m., when claimant came to work. She said claimant came into the break room where she was and made romantic advances to her. She stated that when claimant got close to her, she could smell the distinct odor of alcohol on his breath. Claimant then attempted to kiss her, but she rejected his advance. She described the alcohol smell as "really strong."

Ms. Randall then left the facility and went home. Sometime between 1:00 a.m. and 3:00 a.m. in the morning, she received a call from claimant, who was still drinking. After a few minutes on the telephone, she terminated the conversation.

There were no other witnesses who testified in this matter.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> However, when dealing with an affirmative defense such as the consumption of alcohol or contribution by alcohol to an injury, the burden shifts to the employer.<sup>2</sup> In this instance, the Board finds that the employer has satisfied its burden of showing that claimant's alcohol consumption on the night of the accident contributed to his injury, therefore eliminating claimant's right to workers' compensation benefits.

This decision to a significant degree hinges upon the credibility of the parties. Claimant's denial of the drinking incident, the meeting with the waitress and the conversation with the night manager directly conflict with the testimony of Mo and Ms. Randall. The Administrative Law Judge, having the opportunity to observe these witnesses testify in person, has been given some deference with regard to the credibility of the various testimonies. The Administrative Law Judge in the Order specifically addressed the fact that, in his opinion, claimant's testimony is "not credible." The Board confirms that finding and affirms the Order denying claimant benefits.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated August 26, 2003, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2003.

---

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
James M. McVay, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Director

---

<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>2</sup> *Cooper v. Exide Corporation*, No. 184,696, 1995 WL 86929 (Kan. WCAB Jan. 6, 1995).